No. 11621

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GROVER J. ELLIS,

Appellant,

vs.

AMERICAN HAWAIIAN STEAMSHIP COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

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Appellant,

vs.

AMERICAN HAWAIIAN STEAMSHIP COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

The United States of America at all times herein mentioned was the owner of the S.S. "Cape Saunders", and the American-Hawaiian Steamship Company was acting as agent for the United States of America in the operation thereof (Ap. 99).

On the 11th day of August, 1945, appellant Grover J. Ellis signed shipping articles at Los Angeles, California, as third-assistant engineer for a foreign voyage and back to a final port of discharge in the United States, for a term of time not to exceed twelve months (Ap. 53, 54). During the course of the voyage and while the S.S. "Cape Saunders" was anchored in the port of Manila, Philippine Islands, appellant sustained certain personal injuries while ashore and off duty (Ap. 93).

Appellant went ashore at Manila about 12:00 o'clock noon on October 4, 1945 with a fellow officer for recreational purposes (Ap. 41). Appellant testified that he

and his companion hitchhiked (Ap. 41) to a Seamen's Club through the public streets of Manila (Ap. 61). This Seamen's Club was located eight or ten miles or half-way across town from the point where appellant went ashore (Ap. 60, 61, 62). About an hour and one-half after appellant's arrival at the Seamen's Club, during which time appellant sat and drank three bottles of beer with his companion (Ap. 42), he went swimming in the pool located on the premises.

After making two or three dives into the pool appellant waded out of the pool and proceeded to make another dive from the spring board and in doing so struck his head on the bottom of the pool (Ap. 43). The depth of the pool at the deep end where appellant was diving from the diving board came up to his first rib when standing up in the pool and was no more than three or four feet deep (Ap. 47-48).

As a consequence of his injuries, thus sustained, appellant was hospitalized (Ap. 44) and signed off the S.S. "Cape Saunders" on October 4, 1945 by the Master (Ap. 54). Appellant was subsequently repatriated to the United States, arriving in San Francisco on or about January 6, 1946 (Ap. 45).

Appellant seeks in this action to collect unearned wages in a sum equal to what he would have earned had he remained in the employ of the S.S. "Cape Saunders" from the date of his discharge to the end of the voyage on December 13, 1946, maintenance from the 6th day of January, 1946 to October 1, 1946 and the cost of his transportation from San Francisco to Los Angeles. Appellant was repatriated from Manila to San Francisco by the United States Army (Ap. 36) and incurred no expenses for his medical care (Ap. 50).

ARGUMENT.

I.

Trial De Novo.

Notwithstanding that an appeal in Admiralty is a trial de novo it is an appeal and every intendment should be and is under the decisions of this circuit in favor of the decision of the Trial Court. Unless the decisions of the District Court Judges before whom these cases are actually tried are given the weight to which they are entitled our trial courts will perform no greater judicial function than that of an evidence gathering agency.

Encouragement should not be given to unsuccessful litigants to bring each case to the next highest court on the fortuitous chance that the triers in the second instance may, as in the case of all things human, reach a different conclusion.

The apostles on appeal show that the appellant testified in open court, and the District Court had the opportunity of seeing and hearing his testimony and continuously propounded questions to him.

This court in numerous cases has affirmed the well established rule that decisions of the trial court, in admiralty, when based upon testimony heard in open court by the trial judge, will not be disturbed by the Appellate Court.

In the case of *The Ernest H. Meyer* (C.C.A. 9) 84 F. (2d) 496, this court, at page 500, said:

> "Until in this or some other case the Supreme Court shall clear up the doubt, we therefore adhere to the rule as stated in The Andrea F. Luckenbach, (C.C.A.) 78 F. (2d) 827, 828, as follows: 'The well

established rule is applicable that the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless clearly against *the weight* of the evidence.' "

See also:

Thomas v. Pacific Steamship Lines, 84 F. (2d) 506 (C.C.A. 9);

The Shangho, 88 F. (2d) 42 (C.C.A. 9);

The Silver Palm, 94 F. (2d) 754 (C.C.A. 9);

The Melody, 157 F. (2d) 448 (C.C.A. 9).

II.

A Seaman Who Sustains Personal Injuries While He Is Voluntarily and of His Own Initiative Using the Facilities of a Seamen's Club Swimming Pool Some Eight to Ten Miles From the Harbor Is Not Injured Within the Scope and Course of His Employment.

Appellant of course does not agree with the foregoing statement and cites four cases in support of his contention in opposition thereto. Two of these cases are State court cases and do not represent the law in this circuit nor in any other circuit so far as appellee has been able to ascertain.

The first of the State court cases cited in support of appellant's contention is that of *Moss v. Alaska Packers Ass'n,* (1945) 70 Cal. App. (2d) 857, 1945 A.M.C. 493. This case was decided by the Appellate Department of the

Superior Court of the City and County of San Francisco. The other State decision cited in support of appellant is that of *Taylor v. United Fruit Company* (1946), 1947 A.M.C. 164, decided by the Municipal Court of the City of New York.

That local State court decisions are not binding on courts of admiralty is axiomatic. It has often been observed by the United States Supreme Court that the Constitution contemplated a system of admiralty and maritime law coextensive with and operating uniformly in the whole country. *The Lottawanna* (1874), 21 Wall. 558, 22 L. Ed. 654; *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 205, 61 L. Ed. 1086.

Appellant cites the case of *Aguilar v. Standard Oil Co.,* (1942) 318 U.S. 724, 87 L. Ed. 1107. This case involved two suits for wages, maintenance and cure. In one of these suits the seaman was injured while leaving his vessel for shore leave and in the second the seaman was injured while returning to his vessel from shore leave. In both suits the injury to the seaman occurred while he was traversing an area between his moored ship and the public streets by an appropriate route. In reaching its conclusion that the seamen were injured within the course and scope of their employment the court reasoned at page 737 in an opinion delivered by Mr. Justice Rutledge as follows:

> "We can see no significant difference, therefore, between imposing the liability for injuries received in boarding or quitting the ship and enforcing it for in-

> juries incurred *on the dock or other premises which must be traversed in going from the vessel to the public streets or returning to it from them.* That much at least is within the liability. How far it extends beyond that point we need not now determine." (Italics added.)

Appellant attempts to extend this decision to cover the case at bar. We submit that to do so is to ignore the principles upon which the decision is predicated. Recognizing that seamen must be given an opportunity to obtain relaxation ashore the Supreme Court by this decision placed upon the maritime employer the obligation of providing a safe passage to and from the vessel. In short, the court saw little difference between liability for injuries received while using the gangway and those sustained while proceeding from the gangway to the public streets. There is much logic in this reasoning, for a seaman has no more choice or control of the gangway he uses than he has of the adjoining premises leading to the public streets. The choice of berth lies exclusively with the steamship. We submit that the decision does not nor did the Supreme Court intend to extend the phrase "scope of employment" to include personal activities of seamen while ashore on public streets or while patronizing public clubs of the seaman's choosing. If the Supreme Court had been of the opinion that this phrase was without limitation with reference to the place of the injury it would not have limited its decision to "*the dock or other premises which must be*

traversed in going from the vessel to the public streets or returning to it from them."

The last case cited by appellant is the case of *Sacony-Vacuum Oil Co. v. Smith*, (1939) 305 U.S. 424, 83 L. Ed. 265. This involved a suit under the Jones Act and the issue presented to the Supreme Court was whether a seaman assumes the risk of defective ship appliances and is therefore not analogous to the case at bar. We therefore fail to see the relevancy of that portion of the court's opinion quoted by appellant.

The case of *Siclana v. United States et al,* (D.C., S.D. N.Y., 1944) 56 F. Supp. 442, decided subsequent to the *Aguilar v. Standard Oil Co.* decision, *supra,* involved a suit by a seaman for injuries sustained while he was returning to his vessel when he was jumped upon by certain unidentified men. The court sustained an exception to the libel, stating that the *Aguilar* decision did not support the libel. After quoting a portion of the *Aguilar* decision the court distinguished the case then before it as follows:

> "In the case at bar the locality of the attack is not identified. Its proximity to the place of employment (the ship) is not disclosed and it may have been so far remote that his employer may not have been under any duty of responsibility whatever."

The injuries sustained by appellant herein were received while he was diving in a private pool the locality of which was so far removed from the vessel (eight to ten miles) that it cannot be said that the vessel was under any duty of responsibility whatsoever. This pool was operated by a private, charitable, non-profit organization unconnected with appellee (Ap. 119).

III.

Appellant Is Precluded From Recovering Wages, Maintenance and Repatriation by Reason of His Wilful Misconduct.

In this connection the Trial Court at the conclusion of the trial said:

> "I do not see how the libelant is entitled to recovery. It looks to me like he comes within the decision of Jackson v. Pittsburgh Steamship Company, 131 F. (2d) 668, where there was a suit under the Jones Act in the first cause of action and maintenance and cure in the second cause of action, and that is where the sailor jumped from the ship to the deck and was injured. There the Court, without appearing to do so, practically adopted the decision of the Ninth Circuit in the Meyer case in its definition of what was meant by 'in the service of the ship,' and in this case I think that is probably the correct definition. I will read it again. I read it this morning.
>
> 'When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service.'
>
> It seems to me that his diving into the swimming pool, when it had a small amount of water, from a diving board, a grown man, 22 years old, who had been swimming many previous times in swimming pools and was a good diver, that he created an intervening cause of his own volition which caused the accident, and that the respondent is not liable." (Ap. 127, 128.)

and thereafter rendered its Findings of Fact and Conclusions of Law reading in part as follows:

"IV.

"That on or about the 4th day of October, 1945, and while the S. S. 'Cape Saunders' was anchored in the port of Manila, Philippine Islands, in the course of her said voyage, the libelant went ashore on his own initiative and for personal reasons unconnected with his employment aboard the S. S. 'Cape Saunders'; that while ashore libelant hitch-hiked his way through the public streets of Manila to the Seamen's Club, situated between eight or ten miles distant from the dock landing where libelant went ashore; that while libelant was at the club and after he had consumed three bottles of beer libelant went swimming in the pool located at said club; that after swimming in said pool for approximately twenty (20) minutes and while diving from a three-foot spring board the libelant struck his head at the bottom of the pool and thereby sustained certain personal injuries.

"V.

"That the pool was not full of water and the depth of the water in the pool where libelant was diving was only between three and four feet deep; that libelant was and is between five feet eight and one-half inches and five feet nine inches tall and that when he stood up the water only came to about his first rib."

"VII.

"That libelant was an experienced swimmer and diver and knew or should have known that the depth of the water in the pool was insufficient to enable him to dive from said springing board with safety;

that libelant wilfully and recklessly dove into said pool at a time when the water was too shallow to permit diving and under such circumstances knew or should have known that injury was virtually inevitable.

"VIII.

"That libelant is twenty-four (24) years of age and holds a marine license of Third Assistant Engineer and also a Stationary Engineer's license in the City of Los Angeles; that his general demeanor in court and the manner and substance of his testimony indicate that he is a man of at least average intelligence and that he did or should have realized the personal risk entailed and the probable consequences of the dive he made into the pool from which he sustained his injuries.

"IX.

"That libelant's injuries and resulting damages were solely and proximately caused by libelant's wilful misconduct." (Ap. 16, 17 and 18)

The complete Findings of Fact and Conclusions of Law are found on pages 15 to 18, inclusive, of the Apostles on Appeal and for the convenience of this court are attached to this brief.

Appellant argues that the findings of the District Court in this respect are but conclusions of law. Appellant himself admitted that he had consumed no less than three bottles of beer (Ap. 42) prior to the time he commenced diving. That libelant's use of the diving board under the circumstances then prevailing was wilful misconduct is hardly questionable. He testified that he dove from a three-foot spring board (Ap. 43) into water that came only to his first rib (Ap. 48). Appellant admitted of hav-

ing made two or three previous dives and as he stated "waded out of the pool" and dove again (Ap. 43). Appellant admitted that he had previous experience in swimming pools and was a good swimmer (Ap. 121-122). Appellant was a licensed officer, and at the time of trial he was twenty-four years of age. (Ap. 44). From these facts it cannot logically be concluded that the finding of wilful misconduct by the District Court was a conclusion of law.

Appellant argues that inasmuch as he was allowed to use the pool while only partially filled and there were no warning signs it was not misconduct on his part. The fact remains, however, that appellant was aware that the pool was but partially filled before he made his unfortunate dive and realized or should have realized the personal risk entailed and the probable consequences of the dive he made into the pool from which he sustained his injuries (Ap. 17, 18). Appellant further argues that others were using the spring board. By appellant's own testimony it appears that the only other person using the spring board was appellant's companion (Ap. 43). Appellant further points out that the accident occurred at the deep end of the pool with which we have no quarrel. From this, however, it cannot be inferred that the water was any deeper than the appellant's testimony would indicate. It would appear that the depth at the shallow end was less than one foot (Ap. 97).

Appellant has quoted a portion of the decision of this court in *Sundberg v. Washington Fish & Oyster Co.*

(C.C.A. 9) 138 F. (2d) 801 and suggests that the reasoning is controlling in the case at bar. It appears from that decision that the injured seaman was shot on board ship by a fellow seaman. The question of misconduct was not involved. It further appears from the decision that the injured seaman did not know that the fellow seaman who shot him was even on deck until he was hit. There is no analogy to be drawn from that decision to the case at bar.

Appellant admits that his case would be different if his incapacity had resulted from infection of venereal disease. If this concession is sound, and we think it is in view of the long line of decisions to this effect, we submit that a seaman who voluntarily and knowingly dives into water too shallow to break the force of his dive stands in no better position, especially where he is a good swimmer and injury might have been expected to result therefrom (Ap. 18).

Appellant seeks to justify his wantonness and recklessness by characterizing his activities as a clean and wholesome sport. Could it not likewise be argued on behalf of the seaman with a venereal disease that there is a physiological justification for his conduct? Maritime employers are not insurers of the health of employees. If a seaman shows no more concern for his physical safety than did appellant, he should not be heard to complain to his employer for restitution. In short, as pointed out by this court in *Meyer v. Dollar S.S. Line*, (C.C.A. 9) 49 F. (2d) 1002, p. 1004, "he was the author of his own misfortune."

The case at bar falls squarely within the decision of *Jackson v. Pittsburgh S.S. Co.* (1942 C.C.A. 6) 131 F. (2d) 668. The facts and reasoning are summarized in the following excerpt from the court's opinion:

> "When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service. The Osceola, *supra;* Meyer v. Dollar S.S. Line, 9 Cir., 49 F. 2d 1002.
>
> *"The plaintiff was not compelled to jump from the ship.* The only expectable injury that he might have suffered from the failure to provide a ladder would have been some inconvenience or delay in leaving the vessel. This could readily have been avoided or minimized either by putting the ladder in place himself or in requesting someone in authority to direct that it be done. *When he leaped from the ship under circumstances where injury might reasonably be expected to result, he acted on his own volition, in the pursuit of his personal affairs, and was not injured 'in the service of the ship.'"* (Italics added.)

Appellant was taken to the 49th General Hospital at Manila after the accident in the swimming pool (Ap. 62). The certificate of the United States Army Forces Western Pacific, 49th General Hospital, was introduced into

evidence by appellee (Ap. 66). This certificate shows a diagnosis of an alcohol blood test of appellant as follows:

> "Alcoholism, acute, moderate, blood alcohol level 1 Mg/cc at 1815 hours, 4 October 1945".

According to appellant's testimony, the injury occurred between 1:20 and 2:50 P. M. (Ap. 43). While we do not here contend that appellant was definitely intoxicated it does appear that his indiscretion may have resulted from the effects of alcohol which is shown by the hospital certificate to have been one milligram of alcohol per cubic centimeter of blood over three hours after the accident.

An interpretation of this blood analysis may be found in a work entitled "Laboratory Methods of the United States Army", Fifth Edition (1944), Edited by Dr. James Stevens Simmons, Brigadier General, United States Army, and Dr. Cleon J. Gentzkow, Colonel, Medical Corps., United States Army, and approved by the Surgeon General of the United States Army. At pages 344-345 this analysis is interpreted as follows:

> "At a level of 1 to 1.5 mg. of alcohol per c.c. of blood an individual is usually under the influence of liquor, but not definitely intoxicated."

While we concede that standing alone the degree of intoxication above indicated might not suffice to defeat appellant's claim we think that when considered with all the evidence in this case the only logical conclusion is that appellant's injuries were occasioned by his own wilful misconduct.

IV.

Appellant Is Not Entitled to Recover the Cost of His Transportation From San Francisco to Los Angeles.

The shipping articles (Ap. 53) provided for a voyage from the "Port of Los Angeles, Calif., to a point in the Pacific Ocean to the westward . . . and back to a final port of discharge in the United States, . . . " Under this employment agreement any obligation to repatriate the appellant terminated when he was repatriated to the Port of San Francisco without cost to him.

Appellant cites four cases in an attempt to support his theory that appellant is entitled to recover his transportation costs from San Francisco to Los Angeles, none of which are in point. Since this question has recently been decided contrary to the position of appellant we will rely entirely on that decision in *United States v. Johnson,* (1947 C.C.A. 9) 160 F. (2d) 789, wherein this court in a similar situation said,

> "he is not entitled to travel expenses from San Francisco to the Port of Los Angeles."

Conclusion.

Appellee respectfully submits that the injuries of appellant were not sustained within the scope and course of his employment but that in any event he has precluded any recovery by his own wilful misconduct and therefore the final decree of the District Court should be affirmed.

Respectfully submitted,

L. K. Vermille,

Dan Brennan,

Overton, Lyman, Plumb,
Prince & Vermille,

Proctors for Appellee American Hawaiian Steamship Company.

SUPPLEMENT.

[TITLE OF COURT AND CAUSE.]

Findings of Fact and Conclusions of Law.

The above entitled action came on regularly for trial on the 29th day of January, 1947, before the Hon. Pierson M. Hall, United States District Judge, the libelant being represented by David A. Fall, Esq.; respondent American Hawaiian Steamship Company being represented by Messrs. Overton, Lyman, Plumb, Prince & Vermille by L. K. Vermille, Esq. and Dan Brennan, Esq.; and evidence, oral and documentary, having been introduced, and the Court having considered the evidence and the law and the arguments of counsel, and being fully advised in the premises, and all proceedings having been duly and regularly taken, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

I.

That libelant was the Third Assistant Engineer on board the S. S. "Cape Saunders," having signed articles on or about the 7th day of August 1945 at Los Angeles, California for a voyage not to exceed six (6) months bound for foreign ports and return to a continental port of the United States of America.

II.

That the Shipping Articles signed by libelant for said voyage provided that the United States of America and the War Shipping Administration were the Operating Company of said S. S. "Cape Saunders" for said voyage and that libelant should receive wages in the sum of Two Hundred and Two Dollars ($202.00) per month.

III.

That the American Hawaiian Steamship Company was an agent of the United States of America and the War Shipping Administration in the operation of said vessel.

IV.

That on or about the 4th day of October, 1945, and while the S. S. "Cape Saunders" was anchored in the port of Manila, Philippine Islands, in the course of her said voyage, the libelant went ashore on his own initiative and for personal reasons unconnected with his employment aboard the S. S. "Cape Saunders"; that while ashore libelant hitch-hiked his way through the public streets of Manila to the Seamen's Club, situated between eight or ten miles distant from the dock landing where libelant went ashore; that while libelant was at the club and after he had consumed three bottles of beer libelant went swimming in the pool located at said club; that after swimming in said pool for approximately twenty (20) minutes and while diving from a three-foot spring board the libelant struck his head at the bottom of the pool and thereby sustained certain personal injuries.

V.

That the pool was not full of water and the depth of the water in the pool where libelant was diving was only between three and four feet deep; that libelant was and is between five feet eight and one-half inches and five feet nine inches tall and that when he stood up the water only came to about his first rib.

VI.

That the club and all of its facilities including the pool were maintained and controlled by a private charitable service organization and in no way connected with or

under the jurisdiction or control of the respondent American Hawaiian Steamship Company, or the United States of America or the War Shipping Administration.

VII.

That libelant was an experienced swimmer and diver and knew or should have known that the depth of the water in the pool was insufficient to enable him to dive from said springing board with safety; that libelant wilfully and recklessly dove into said pool at a time when the water was too shallow to permit diving and under such circumstances knew or should have known that injury was virtually inevitable.

VIII.

That libelant is twenty-four (24) years of age and holds a marine license of Third Assistant Engineer and also a Stationary Engineer's license in the City of Los Angeles; that his general demeanor in court and the manner and substance of his testimony indicate that he is a man of at least average intelligence and that he did or should have realized the personal risk entailed and the probable consequences of the dive he made into the pool from which he sustained his injuries.

IX.

That libelant's injuries and resulting damages were solely and proximately caused by libelant's wilful misconduct.

X.

That libelant's injuries were sustained outside the scope and course of his employment.

XI.

That libelant was taken to the United States Forty-Ninth General Hospital in Manila, Philippine Islands and subsequently flown to the United States Marine Hospital at San Francisco. California, where he received hospital care until January 6, 1946; that soon thereafter libelant returned to Los Angeles where he received out patient care from time to time and for several months from the United States Public Health Service at Los Angeles.

XII.

That libelant's hospital care and medical needs were supplied and furnished without cost to him; that libelant was repatriated from Manila, Philippine Islands to San Francisco without cost to him; that libelant paid his own plane fare of Twenty Dollars ($20.00) from San Francisco to Los Angeles and that said sum is the reasonable cost of said fare.

From the foregoing findings of fact the Court makes the following conclusions of law:

Conclusions of Law.

That the libelant Grover J. Ellis is not entitled to recover any sum whatsoever from the respondent American Hawaiian Steamship Company, a corporation, and that said libel should be dismissed without costs to said respondent.

Peirson M. Hall,
United States District Judge.

David A. Fall,
Proctor for Libelant.